

1991

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Recommended Citation

Howley, James D. (1991) "Alive and Kicking: The Kashmir Dispute Forty Years Later," *Penn State International Law Review*: Vol. 9: No. 1, Article 5.

Available at: <http://elibrary.law.psu.edu/psilr/vol9/iss1/5>

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Alive and Kicking: The Kashmir Dispute Forty Years Later

I. Introduction

The Kashmir dispute between India and Pakistan involves a struggle between two powers for the possession of a tract of territory which each wants for its own valid reasons. The stakes are of major economic, political and strategic significance to Pakistan, while to India, Kashmir has become a symbol of national prestige and international justice.¹ Charges of aggression and violations of international law have been asserted by both parties. In considering a solution to the Kashmir dispute, it is necessary to look beyond the blatant facts and see the elements that gave rise to the dispute and the circumstances under which it occurred.

A purely legalistic approach never solves large political problems. With this in mind, this Comment begins with an examination of the roots of the conflict: Kashmir's economy, geography, predominantly Moslem population and Hindu ruler. It will then look at the dispute over Kashmir's accession to India and obligations resulting from United Nations involvement in the dispute. This Comment will focus on the important role the policies and practices of India and Pakistan have played in the development of events, and the part these elements must play in arriving at a solution.

II. The Roots of Conflict

On August 15, 1947, British India was partitioned under the Indian Independence Act, creating the Dominions of India and Pakistan.² The partition of India into independent India and Pakistan was an extremely complicated process for which the British made absolutely no preparation.³ Before the summer of 1947, no real thought had been given to the division of Indian financial assets, the Indian army, diplomatic missions abroad, communications, the water supply to irrigation projects and a thousand other problems that

1. Alam, *Peacekeeping Without Conflict Resolution: The Kashmir Dispute*, 6 FLETCHER F. 61, 62 (1982) [hereinafter Alam].

2. H.S. GURURAJ RAO, *LEGAL ASPECTS OF THE KASHMIR PROBLEM* 156 (1967) [hereinafter H.S. GURURAJ RAO].

3. A LAMB, *THE KASHMIR PROBLEM, A HISTORY SURVEY* 11 (1966) [hereinafter A. LAMB].

would arise upon partition.⁴

In one sense, the Kashmir dispute can be seen as a consequence of Britain's failure to find a satisfactory means of integrating the princely states into independent India and Pakistan.⁵ The Indian Independence Act merely provided that the princely states could accede to either India or Pakistan or consider some other arrangement.⁶ At the time of partition, Kashmir was one of three princely states that had not determined its future status.⁷

A. A Brief Survey of Kashmir's Population, Economy and Geography

Before 1947, the state of Jammu and Kashmir (Kashmir) was a region with an 80% Moslem majority contiguous with the Moslem majority region of the Punjab which became part of Pakistan.⁸ Kashmir is not a homogeneous unit, but actually consists of five regions: the "Vale" of Kashmir was 90% Moslem, the Jammu province contained a 59% Hindu majority, the Poonch province contained a Moslem majority of over 90%, and the Gilgit region in the northwest is predominantly Moslem.⁹ Finally, the Ladakh and Baltistan region, treated as a single district, is split, Ladakh possessing an overwhelmingly Buddhist population, while Baltistan is overwhelmingly Moslem.¹⁰

In 1947, the economy of Kashmir was closely linked with Pakistan.¹¹ Its best communications with the outside world lay through Pakistan by way of the Indus River and the road from Srinagar, the Maharaja's summer capital, to Rawalpindi in Pakistan.¹² In addition, these were the routes used for the bulk of Kashmir's exports.¹³

Finally, the waters of the Indus, Jhelum and Chenab, all of which flow through Kashmir territory, were vital to the agricultural

4. *Id.*

5. *Id.* at 3. When Britain relinquished control, there were 562 princely states of various sizes in British India, covering about one-third of the total area of the Indian Empire. The princely states came into being as a result of the concept of *paramountcy* whereby some Indian rulers were allowed to survive as sovereignties in treaty relationship with the British Crown. These rulers in turn surrendered to the Crown the right to conduct their own foreign policy, but retained a great deal of independence in other areas. In matters of internal policy, the rulers could do as they pleased, provided they did not threaten the stability of British rule in the subcontinent or commit acts of oppression so obvious as to offend the British-Indian Government. In addition, the British made no attempt to ensure that the rulers of the states belonged to the same religious community as did the majority of their subjects. *Id.* at 4.

6. H.S. GURURAJ RAO, *supra* note 2, at 21 (citing the Indian Independence Act, §§ 2(4), &(1)).

7. A. LAMB, *supra* note 3, at 15. The other regions were Junagadh and Hyderabad. *Id.*

8. *Id.* at 22.

9. *Id.* at 18-20.

10. *Id.* at 19.

11. *Id.* at 22.

12. *Id.* at 21.

13. *Id.* at 22.

life of Pakistan.¹⁴ Based on the culture and economy of the region, a well-planned partition would have awarded the greater part of Kashmir to Pakistan. However, Kashmir, with its overwhelming majority of Moslem, was controlled by a Hindu ruler of the dynasty known as the Dogra Rajputs.¹⁵

B. Accession and Conflict

As previously mentioned, at the time of partition, Kashmir had not determined its future status. The Maharaja could not decide whether to accede to India or Pakistan or to remain independent.¹⁶ In August of 1947, the Maharaja entered into a Standstill Agreement with Pakistan.¹⁷ This agreement transferred responsibility for administering certain services in Jammu and Kashmir such as the post, telegraph and railways from India to Pakistan.¹⁸

However, with revolt in the Poonch province, the Maharaja soon changed his mind.¹⁹ Poonch had been an important recruiting area for the British army during World War II.²⁰ As a result, ex-service-men in this area provided a cadre of military experience which, in August of 1947, became the nucleus for the Azad (Free) Kashmir liberation movement.²¹ While India accused Pakistan of supplying the movement with weapons and troops, it appears that the Poonch rebels were in contact with the Pathan tribal country in Pakistan where they sought arms produced in village workshops.²²

Initially, the Poonch rising appears to have been nothing more than an attempt to throw off the rule of the Maharaja after partition, but its character soon changed.²³ By September, the Moslem-Sikh conflict which had been raging in the Punjab overflowed into Kashmir.²⁴ In Jammu, Hindu and Sikh bands crossing over from the Punjab touched off a series of massacres which killed over 200,000 Moslems.²⁵ The Pathan tribesmen in contact with the Azad Kashmir

14. *Id.*

15. *Id.* at 23-26. Gulab Singh, creator of the modern state of Jammu and Kashmir, was a member of the Dogra family, claiming Rajput ancestry. By 1840, Gulab Singh, the Raja of Jammu, had gained control over Poonch, Ladakh, and Baltistan. In 1846, with the defeat of the Sikh Kingdom of Lahore by the British, Gulab Singh accepted British paramountcy and purchased the Vale of Kashmir for 7,500,000 rupees. Gulab Singh and his successors were only partly successful in bringing the Gilgit region under control. By the 1890's, it was the British Agent at Gilgit who wielded the real authority here. It was in this way that a group of otherwise unrelated tracts of land became the princely state of Jammu and Kashmir. *Id.*

16. Alam, *supra* note 1, at 62.

17. *Id.*

18. *Id.*

19. A. LAMB, *supra* note 3, at 36.

20. *Id.* at 37.

21. *Id.*

22. *Id.*

23. *Id.* at 38.

24. *Id.*

25. *Id.*

movement, hearing of these events, invaded Kashmir on October 22.²⁶ Pakistan blames India for the massacres, while India blames Pakistan for the tribal invasion.²⁷ However, it is argued that the massacres occurred without influence from the Indian government and provoked the Pathan tribal invasion.²⁸

It was in the context of this invasion that the Maharaja decided to execute the Instrument of Accession to India.²⁹ After acceptance by the Governor-general of India on October 27, 1947, Indian troops entered Kashmir and pushed the tribesmen back, but were unable to expel them from the border areas.³⁰

1. *Kashmir and the United Nations*.³¹—Following the failure of the two governments to settle the Kashmir conflict by direct negotiations, the Indian government, through its representative to the United Nations (U.N.), brought the situation to the attention of the Security Council on January 1, 1948, under Articles 34 and 35 of the U.N. Charter.³² India accused Pakistan of giving assistance to the invading forces, "including, but not limited to, the supply of arms and ammunition."³³ Pakistan, instead of answering the specific charges of aggression, filed countercharges against the government of India under Article 35, charging it with the breach of international agreements, incitement of revolution, "numerous attacks on Pakistan territory," and an "extensive campaign of genocide . . . the object [of which] is the destruction of the state of Pakistan."³⁴

In response to the situation, the Security Council established the United Nations Commission on India and Pakistan (UNCIP).³⁵ UNCIP had a dual function: to investigate the facts pursuant to Article 34 of the U.N. Charter, and to exercise any mediatory influence likely to smooth away difficulties and carry out the directions of the Council.³⁶ On April 21, after three months of further consideration,

26. Alam, *supra* note 1, at 62.

27. A. LAMB, *supra* note 3, at 38.

28. *Id.*

29. S.P. SHUKLA, *INDIA AND PAKISTAN, THE ORIGINS OF ARMED CONFLICT* 4 (1984) [hereinafter S.P. SHUKLA].

30. Alam, *supra* note 1, at 62.

31. India became a member of the U.N. on October 30, 1945, while Pakistan joined the U.N. on September 30, 1947. U.N. DEP'T OF PUB. INFO., *EVERYONE'S UNITED NATIONS*, at 8-9, U.N. Sales No. E.79.I.5 (9th ed. 1979) [hereinafter *EVERYONE'S UNITED NATIONS*].

32. U.N. CHARTER art. 34: "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." *Id.*

Art. 35, para. 1: "Any Member of the United Nations may bring any dispute, or any situation referred to in Article 34, to the attention of the Security Council . . ." *Id.*

33. Alam, *supra* note 1, at 63.

34. *Id.*

35. *Id.* at 64 (citing S.C. Res. 39 of 20 Jan. 1948).

36. *Id.*

the Security Council adopted a second resolution advising that both Indian troops and the tribesmen should withdraw; that an interim government should be established to represent "the major [Kashmiri] political groups" (meaning both the Indian-influenced National Conference of Kashmir and the Pakistani-influenced Azad Kashmir elements); and that a five-man UNCIP should go to Kashmir to exercise its good offices in helping the two nations restore peace and arrange a fair plebiscite.³⁷ While the resolution essentially agreed with an earlier Pakistani call for troop withdrawals and a plebiscite, which India rejected, Pakistan felt that an impartial plebiscite would be impossible under the National Conference of Kashmir (National Conference).³⁸ The resolution was rejected by both parties.³⁹

When UNCIP arrived in Pakistan on July 7, 1948, it discovered that the situation had changed drastically.⁴⁰ Pakistani Foreign Minister Zafrullah Khan admitted that Pakistani troops had been fighting in Kashmir since May 8.⁴¹ Discovering this, UNCIP shifted its efforts to effect a cease-fire followed by a truce agreement providing for demilitarization.⁴² This would permit a free and impartial plebiscite to be held throughout Kashmir.⁴³ The results of the Commission's efforts were agreements which were embodied in the Commission's resolutions of 13 August 1948 and 5 January 1949 and were accepted by both parties.⁴⁴ These were implemented in two ways: First, by the cessation of hostilities effected January 1, 1949.⁴⁵ Second, the military commanders for India and Pakistan agreed upon a cease-fire line to be supervised by the U.N. Military Observer Group in India and Pakistan (UNMOGIP) under the Karachi Agreement, which was signed on July 22, 1949.⁴⁶

After the cease-fire agreement, the UN accomplished little in Kashmir. In 1965 and 1971 the dispute over Kashmir flared into large-scale conflict, resulting in minor adjustments to the cease-fire line.⁴⁷ To this day, sporadic fighting continues between Indian and Pakistani troops for possession of the Siachen Glacier in the Saltoro

37. *Id.* (citing S.C. Res. of 21 Apr. 1948). A plebiscite is a direct vote on an important issue by an entire people. AMERICAN HERITAGE DICTIONARY 526 (2d ed. 1983).

38. Alam, *supra* note 1, at 64-65.

39. *Id.* at 65.

40. See Alam, *supra* note 1, at 66.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Karachi Agreement, July 27, 1949, India-Pakistan, part. II(I), 81 U.N.T.S. 273, 282 [hereinafter Karachi Agreement].

47. See generally J. PRESCOTT, POLITICAL FRONTIERS AND BOUNDARIES 61 (1987) [hereinafter J. PRESCOTT] (detailing the shifts in the cease-fire line since 1947); Desmond, *War at the Top of the World*, TIME, July 31, 1989, at 26 [hereinafter Desmond].

Range.⁴⁸ Moreover, many fear that current tensions over Kashmir may plunge India and Pakistan into an unprecedented full-scale war where both sides possess nuclear forces.⁴⁹

III. Accession

On October 26, 1947, the Maharaja, without reference to his subjects, executed an Instrument of Accession in favor of the government of India.⁵⁰ The Maharaja's accession was formally accepted the following day by Governor-general, Lord Mountbatten.⁵¹ However, by this time Kashmir was, in effect, divided into three distinct sectors: Azad Kashmir, "Legal" Kashmir and the Gilgit region.⁵²

A. *Legality of Accession*

Two days before the Maharaja signed his Instrument of Accession to India, the Poonch rebels and their tribesman-allies set up the Azad Kashmir government headquartered at Muzaffarabad.⁵³ Additionally, there was "Legal" Kashmir, the regime set up by the Maharaja under the leadership of Sheikh Abdullah, which came into effect in March, 1948.⁵⁴ Finally, there was the Gilgit region, comprising approximately one-third of the state's area, which passed virtually without conflict into Pakistani hands during the course of the last three months of 1947.⁵⁵

1. *Competence to Transfer Sovereignty.*—Indian writers assert that the Maharaja was competent to transfer all of Kashmir to India.⁵⁶ State succession, whether by violent annexation, peaceful cession or by other means, occurs when one state is substituted for another in sovereignty over a given territory.⁵⁷ Sovereignty is the key word here. The Maharaja did not exercise sovereignty over the

48. Desmond, *supra* note 47, at 26.

49. Spector, *India-Pakistan War: It Could Be Nuclear*, N.Y. Times, June 7, 1990, sec. A, at 23, col. 2.

Though neither state is thought to have deployed nuclear weapons as yet, both could do so within weeks. A leader of the militant Hindu B.J.P. Party—a part of Prime Minister V.P. Singh's parliamentary coalition in India—has declared, for example, that if war comes, "Pakistan will cease to exist." In contrast, the hostilities between Chinese and Soviet forces in the late 1960's—the only time two nuclear states actually clashed—were limited to skirmishes for control of a remote border area.

Id.

50. A. LAMB, *supra* note 3, at 35.

51. *Id.*

52. *Id.* at 66.

53. *Id.*

54. *Id.*

55. *Id.*

56. H.S. GURURAJ RAO, *supra* note 2, at 33.

57. See D. O'CONNELL, *THE LAW OF STATE SUCCESSION* 3 (1956).

Gilgit region, which constituted one-third of Kashmir.⁵⁸

Under international law, if a dispute arises as to sovereignty over a portion of territory where one party has actually displayed sovereignty, it is not enough for the other party to show territorial sovereignty once existed; it must also be shown that the territorial sovereignty has continued to exist and did exist at the time critical to deciding the dispute.⁵⁹ This demonstration consists of the actual display of state activities that may be performed only by a territorial sovereign.⁶⁰ "The principle that continuous and peaceful display of the functions of state within a given region is a constituent element of territorial sovereignty is . . . based on . . . international jurisprudence and doctrine widely accepted"⁶¹

Although sovereignty was exercised over the rest of Kashmir, the Maharaja's predecessors were, at best, only partially successful in bringing the Gilgit region under Dogra rule.⁶² By the 1890s, it was the British Agent at Gilgit who wielded the real authority there.⁶³ In 1935, the British leased Gilgit from Kashmir for sixty years, but surrendered their lease on the eve of partition.⁶⁴ In theory, sovereignty reverted to Kashmir, but the Maharaja was never able to make this sovereignty effective in any way.⁶⁵ When the Maharaja sent a governor to Gilgit, the Gilgit Scouts imprisoned him and turned the territory over to Pakistan.⁶⁶ In light of this fact, it is clear that the Maharaja did not perform the activities of a territorial sovereign in the Gilgit region. As such, the Maharaja had never exercised sovereignty over the region, and could not transfer more rights than he possessed.⁶⁷ Therefore, India did not receive the Gilgit region, now possessed by Pakistan, under the Instrument of Accession.

2. *Possession by Occupation.*—Occupation is the act of appropriation by a state through which it intentionally acquires sovereignty over such territory that is not under the sovereignty of another state.⁶⁸ The occupied territory must have been *terra nullius*,

58. See A. LAMB, *supra* note 3, at 66.

59. H. BRIGGS, *THE LAW OF NATIONS* 239, 240 (2d ed. 1952) (citing *Island of Palmas Case*, (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928) (dispute over Spain's capability to cede the Island of Palmas to the U.S.)) [hereinafter H. BRIGGS].

60. *Id.*

61. *Id.* at 241.

62. A. LAMB, *supra* note 3, at 66.

63. *Id.*

64. *Id.*

65. *Id.*

66. H.S. GURURAJ RAO, *supra* note 2, at 101. Under British rule, Gilgit had been the responsibility of a body called the Gilgit Scouts commanded by British officers. *Id.* at 100.

67. H. BRIGGS, *supra* note 59, at 242.

68. N. HILL, *CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS* 146 (1945).

without owner, and the occupation must have been real or "effective."⁶⁹ Effective occupation occurs when there is an announced intention to acquire the territory, and actual settlement or occupation with the assertion of governmental authority has taken place.⁷⁰

As previously shown, after the British surrendered their lease on the eve of partition, the Gilgit region was a *terra nullius*.⁷¹ At the time of accession, under the August 1947 Standstill Agreement, Pakistan alone was responsible for administering services in Kashmir such as the post, telegraph and railways.⁷² These services were the beginning of Pakistan's establishment of government authority over the region. This process was completed after the territory was transferred to Pakistan by the Gilgit Scouts.⁷³ Since this time, Pakistan has claimed the Gilgit region, formerly a *terra nullius*, as part of its territory, keeping it beyond the control of the Azad Kashmir authorities and making it an integral part of Pakistan.⁷⁴ In doing so, Pakistan has established governmental control sufficient to provide security to life and property. Thus, Pakistan effectively occupies the Gilgit region to the exclusion of India.

3. *Provisional Accession*.—At the outset, there was a clear declaration by India that the Kashmir accession contained within it a definite provisional element.⁷⁵ The accession was brought about as an emergency measure to meet the crisis of an invasion by Moslem tribesmen and once the crisis was met, required ratification in some form by the people of the state.⁷⁶ The general rules of interpreting treaties apply in this situation. [I]n treaty interpretation, three major factors are pertinent: (a) the text of the treaty expressing the agreement of the parties, (b) the intention of the parties, as a subjective element, and (c) the object and purpose of the treaty.⁷⁷ The "text of the treaty" in this case is the Instrument of Accession and the acceptance by the Governor-general of India. While the Instrument of Accession makes no reference to the will of the people, the Indian acceptance of accession came in the form of two letters: One was a formal statement by Mountbatten, the Governor-general, that "I hereby accept this Instrument of Accession."⁷⁸ The second was a personal letter in reply to a letter from the Maharaja, in which the

69. *Id.*

70. *Id.* at 146-47.

71. See *supra* text accompanying notes 50-67.

72. Alam, *supra* note 1, at 62.

73. See *supra* text accompanying note 66.

74. See A. LAMB, *supra* note 3, at 66.

75. *Id.* at 35.

76. *Id.* at 35-36.

77. T. ELIAS, *THE MODERN LAW OF TREATIES*, 72, 74 (1974) [hereinafter T. ELIAS].

78. A. LAMB, *supra* note 3, at 46.

reasons for seeking to accede were outlined.⁷⁹ In this letter, Mountbatten stated that "it is my government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the state's accession should be settled by a reference to the people."⁸⁰

This second letter is a document that should be regarded as included in the context of the accession because it is an agreement relating to the accession which was made between the parties in connection with the conclusion of the Accession Agreement.⁸¹ As such, the letter should be treated as part of the context of the Accession Agreement for the purpose of giving meaning to the terms of the Instrument of Accession and its acceptance.⁸² That was agreed to by both parties is evidenced by Indian Prime Minister, Jawaharlal Nehru's radio broadcast from New Delhi on November 2, 1947.⁸³ In this broadcast, Nehru stated that the fate of Kashmir was ultimately to be decided by the people.⁸⁴ "That pledge we have given, and the Maharaja has supported it, not only to the people of Kashmir, but to the world. We are prepared when peace and law and order have been established, to have a referendum held under international auspices like the United Nations."⁸⁵

Therefore, though there was no mention of provisional accession in this Instrument of Accession or the formal acceptance, it clearly was part of the instrument. The provisional character of the accession and the need for an eventual reference to the will of the people, reaffirmed on several occasions by Jawaharlal Nehru, gave rise to the whole issue of a Kashmir plebiscite.⁸⁶ This carried with it the possibility that the people might opt for independence or union with Pakistan.

79. *Id.* The reasons stated in the Maharaja's letter were the uprisings in the Poonch region and the tribal invasion. *Id.*

80. *Id.*

81. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, art. 31, para. 2; reprinted in T. ELIAS, *supra* note 77, at 227-56; Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.129/15 (1986) [hereinafter Vienna Convention on the Law of Treaties]: "The context for purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(1) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty."

82. T. ELIAS, *supra* note 77, at 75 (discussing the Vienna Convention on the Law of Treaties, *supra* note 81): "The other documents that should be regarded as comprised in the 'context' are of two types: (i) any agreement relating to the treaty which was made in connection with the conclusion of the treaty" *Id.*

83. Alam, *supra* note 1, at 69 (citing Radio broadcast from New Delhi by Indian Prime Minister Jawaharlal Nehru (Nov. 2, 1947)).

84. *Id.*

85. *Id.*

86. A. LAMB, *supra* note 3, at 47.

B. Accession in Context with Other Events

India makes much of the fact that the accession was accepted by Sheikh Abdullah and his party, the National Conference.⁸⁷ However, India makes no mention of the fact that on the eve of partition, the Maharaja had imprisoned the leaders of both the Muslim Conference and the National Conference.⁸⁸ Abdullah, who was strongly influenced by the Indian National Congress, had been released from prison a month before accession after visits to Kashmir by Congress members.⁸⁹ In contrast, Muslim Conference leader, Ghulam Abbas, influenced by the Muslim League of Pakistan, remained in prison and his party remained underground.⁹⁰ Moreover, Abdullah ratified the accession to India in return for promises of extensive local autonomy for Kashmir but Kashmir's special status has been whittled away over the years.⁹¹

Indian commentators emphasize the legality of India's acts, condemning Pakistan for the use of force and coercion.⁹² However, such arguments must be viewed with an eye on India's overall conduct. Junagadh, one of the three Indian states which had not determined their future at the time of partition, consisted of a Hindu majority ruled by a Moslem dynasty.⁹³ Here, India rejected the Moslem ruler's decision to accede to Pakistan.⁹⁴ In violation of the Standstill

87. H.S. GURURAJ RAO, *supra* note 2, at 39.

88. A. LAMB, *supra* note 3, at 36.

89. *Id.* at 41.

90. *Id.* at 42.

91. MacFarquhar, *The Kashmir Question*, U.S. NEWS & WORLD REPORT, June 11, 1990, at 42, 44 [hereinafter MacFarquhar]. For example, Article 370 of the Constitution of India provides:

(1) Notwithstanding anything in this Constitution—

(a) the provisions of Art. 238 [sic] shall not apply in relation to the State [sic] of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State [sic] shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government [sic] of the State [sic] of Jammu and Kashmir], are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State [sic] to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the State [sic].

CONSTITUTION OF INDIA, art. 370, *reprinted in* H.S. GURURAJ RAO, *supra* note 2, at 341-42, n.111. However, such autonomy is rendered meaningless in view of the fact that the current Governor of Kashmir, Girish Saxena is a former chief of India's main intelligence agency and has vowed to continued India's crackdown on the armed Kashmiri militants. This crackdown was initiated by former Governor Jagmohan, who was removed in May, 1990 after security forces fired on a procession of unarmed mourners of a murdered Moslem prelate. Coll, *100,000 Demonstrate in Kashmir*, Wash. Post, June 1, 1990, at A29, col. 1.

92. See H.S. GURURAJ RAO, *supra* note 2, at 37; H.O. AGARWAL, *KASHMIR PROBLEM—ITS LEGAL ASPECTS* 31, 49 (1980) [hereinafter H.O. AGARWAL].

93. A. LAMB, *supra* note 3, at 15.

94. *The India-Pakistan Question*, 1948 U.N.Y.B. 400, U.N. Sales No. 1949.1.13 [hereinafter *The India-Pakistan Question*].

Agreement with Pakistan, the Indian government cut off all communications and supplies.⁹⁵ While exchanges over this action were taking place between the governments of India and Pakistan, a provisional government of Junagadh was set up in Indian territory and had taken possession of certain Junagadh property in that territory.⁹⁶ This occupation by Indian troops occurred on October 22, 1947, the very same day that the Pathan tribesmen, incited by the massacre of Moslems in Jammu, invaded Kashmir.⁹⁷ India's military occupation occurred months before Pakistan's aggression in Kashmir.

Indian possession of the state of Junagadh was ratified by plebiscite in February of 1948.⁹⁸ As Junagadh had acceded to Pakistan, the government of Pakistan regarded this as a direct act of hostility on the part of the Indian government against Pakistan.⁹⁹

IV. Charges of Aggression

Indian commentators brand Pakistan as the aggressor in Kashmir, using force and coercion to usurp the territory.¹⁰⁰ But here again, India's claims must be considered in context with its words and deeds elsewhere. India's treatment of Junagadh and Hyderabad must be considered in viewing Pakistan's actions in Kashmir and its claim of anticipatory self-defense.

A. Coercion and Aggression

India claims that economic sanctions were used by Pakistan to coerce Kashmir's accession to Pakistan in violation of the Standstill Agreement.¹⁰¹ However, Pakistan asserted that the stoppage in supplies was due to a transportation crisis in West Punjab resulting from the chaotic conditions existing at the time.¹⁰²

Regardless of the truth of this statement, it must be remembered that India used an economic blockade against Junagadh, cutting off all communications and supplies in violation of a standstill agreement with Pakistan.¹⁰³ India denied the use of economic sanctions, blaming the supply stoppage on the chaos resulting from the breakdown of the administration of Junagadh.¹⁰⁴ Further-

95. *Id.*

96. *Id.* The use of the term Junagadh here includes the petty states of Mangrol and Manavadar.

97. *Id.* Manavadar was occupied by Indian troops and its ruler removed on October 22, 1947. *Id.*; see *supra* text accompanying notes 23-27.

98. A. LAMB, *supra* note 3, at 15.

99. *The India-Pakistan Question*, *supra* note 94, at 400.

100. H.S. GURURAJ RAO, *supra* note 2, at 44.

101. H.O. AGARWAL, *supra* note 92, at 31.

102. A. LAMB, *supra* note 3, at 43-44.

103. See *supra* text accompanying notes 92-100.

104. *The India-Pakistan Question*, *supra* note 94, at 400.

more, India used economic sanctions again against Hyderabad, the third undecided Indian state, during 1948 in an attempt to force its Moslem ruler to accede his Hindu-majority state to India.¹⁰⁵ When this failed, India resorted to military occupation in September, 1948 to achieve its objective.¹⁰⁶

In addition, India accuses Pakistan of aiding and abetting Pakistani tribesmen, in conducting raids across its entire border with Kashmir by providing weapons, supplies and Pakistani troops before Kashmir's accession to India.¹⁰⁷ As previously mentioned, the Poonch rebels of the Azad Kashmir liberation movement appear to have established contact with the Pathan tribesmen in Pakistan where they sought arms made in village workshops.¹⁰⁸ These links played a role in the Pathan tribal invasion of Kashmir.¹⁰⁹ When news of the massacres in Jammu reached the tribesmen they joined forces with the Azad Kashmir forces and invaded Kashmir on October 22, 1947.¹¹⁰ Evidence suggests that, as claimed by Pakistan, the Pakistani government lost control in the Kashmir crisis and was unable to control the tribesmen.¹¹¹ As asserted by historian Alistair Lamb, it is unlikely that Mohammed Ali Jinnah, the Pakistani Governor-general, could have stopped the tribesmen and their sympathizers from intervening in Kashmir, even had he known what was afoot.¹¹² It would probably be as fair to blame Jinnah for the tribal outrages in Kashmir as to blame Jawaharlal Nehru and his colleagues for the massacres of Moslems by Sikhs and Hindus in Jammu.¹¹³

Nevertheless, Indian writers still argue that Pakistan is to blame.¹¹⁴ H.S. Gururaj Rao asserts that:

The State [sic] which knows that an individual is plotting an unlawful act against a foreign State [sic] and does not prevent it when it should have done so; and the State [sic] which receives an offender and screens him from punishment by refusing either to extradite or punish him, become in a certain manner accomplices in the commission of the offenses, a kind of solidarity is created between them and the culprit, derived from the tacit approval of the act; and from this approval, and not from the relationship between the individual and the State [sic],

105. A. LAMB, *supra* note 3, at 15.

106. *Id.*

107. Alam, *supra* note 1, at 63; S.P. SHUKLA, *supra* note 29, at 4.

108. See *supra* text accompanying notes 19-28.

109. *Id.*

110. *Id.*

111. A. LAMB, *supra* note 3, at 51.

112. *Id.*

113. *Id.*

114. H.S. GURURAJ RAO, *supra* note 2, at 46.

arises the responsibility of the State [sic].¹¹⁵

But as mentioned before, Pakistan lost control of the situation and could not have prevented it even if it had known of the problem beforehand.¹¹⁶ In addition, Pakistan would not have been dealing with an individual offender, but tribes of offenders which it did not have the power to stop in the first place.¹¹⁷ It is likely that punishment for this act would have caused violence and unrest in Pakistan. However, this became a moot point upon Pakistan's decision to commit troops to Kashmir.

B. Anticipatory Self-Defense

Pakistan committed troops to Kashmir on May 8, 1948, defending such action on the grounds of anticipatory self-defense.¹¹⁸ In support of India, writers argue that while this is acceptable under customary international law, it is limited under article 51 of the U.N. Charter to defense against armed attack.¹¹⁹ India was the only U.N. member to object to Pakistan's justification of anticipatory self-defense under article 51 of the U.N. Charter.¹²⁰

Article 51 acknowledges the inherent right of self-defense.¹²¹ It seems to allow that interpretation must take into account a basic and natural law right of self-defense beyond limitations created by man-made law.¹²² Therefore, the content of the right to self-defense would basically be greater than that which the charter gives it.¹²³

From debates during and after the adoption of the U.N. Charter, and in particular on the formulation of the concept of aggression, it seems unlikely that article 51 excludes anticipatory action.¹²⁴ The traditional test for justified self-defense requires that there must be a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation," and the action taken must not be "unreasonable or excessive, and must be "limited by that necessity and kept clearly within it."¹²⁵

115. *Id.*

116. *See supra* text accompanying notes 105-07.

117. *Id.*

118. Alam, *supra* note 1, at 66.

119. H.O. AGARWAL, *supra* note 92, at 48; U.N. CHARTER, art. 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member [sic] of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

120. 1 D.O'CONNELL, INTERNATIONAL LAW 317 (2d ed. 1970) [hereinafter D. O'CONNELL].

121. *See supra* note 119.

122. D. O'CONNELL, *supra* note 120, at 317.

123. *Id.*

124. *Id.*

125. *Id.* at 316 (citing *The Caroline Case* (U.S. v. Gr. Brit.), (1837)). "[I]t seems unlikely that members would agree that the Article excludes anticipatory action, or that it has abrogated the doctrine in *The Caroline*." *Id.*

In the Kashmir conflict, Pakistan has a strong argument in support of the necessity of self-defense. Before partition, Britain's idea of partitioning India was greeted with distaste by the Hindu majority in the Indian national movement.¹²⁶ The Hindu majority refused to acknowledge the validity of the "two-nation" theory of Mohammed Ali Jinnah and the Muslim League; that the subcontinent contained two separate and incompatible elements, Hindu and Moslem.¹²⁷ The "one-nation" school of thought viewed partition as a temporary situation.¹²⁸ Pakistan would soon pass away in the face of a reunited Indian State.¹²⁹ To the "one-nation" school, Pakistan had no right to exist and should never have been allowed to happen.¹³⁰

During the course of 1947-48, the "one-nation" theory could be seen at work in the policies of the government of India toward Kashmir, Junagadh and Hyderabad. In Junagadh, the Moslem ruler's accession to Pakistan was rejected, and Indian possession of the state was ratified by its Hindu majority in February 1948, by a plebiscite.¹³¹ In Hyderabad, the Moslem ruler's question for independence was challenged by an Indian economic blockade, followed in September 1948 by Indian military occupation.¹³²

In view of India's past exercise of the "one-nation" policy, it is possible to understand Pakistan's fear embodied in the accusation that "the object of the various acts of aggression by India against Pakistan is the destruction of the state of Pakistan."¹³³ In addition, the Indian Army, now occupying neighboring Kashmir, possessed at least twice the armed might of Pakistan at the time of partition.¹³⁴ In view of these facts and Kashmir's contiguous border with Pakistan, the necessity to deal quickly with this threat on Pakistan's borders is evident. Furthermore, Pakistan's action was not unreasonable or excessive and was limited by necessity. At no time did the number of Pakistani troops in Kashmir outnumber the Indian forces present there.¹³⁵

Article 51 requires that measures taken by members in the exercise of the right of self-defense shall immediately be reported to

126. A. LAMB, *supra* note 3, at 13; J. KORBEL, DANGER IN KASHMIR 43 (1954) [hereinafter J. KORBEL].

127. A. LAMB, *supra* note 3, at 13.

128. *Id.*

129. *Id.*

130. *Id.*

131. See *supra* text accompanying notes 92-99.

132. A. LAMB, *supra* note 3, at 15.

133. Alam, *supra* note 1, at 63.

134. S.P. SHUKLA, *supra* note 29, at 2-3. The comparative figures of armed forces between India and Pakistan after the partition were as follows: armored regiments 12:6; artillery regiments 18:8; engineer regiments 61:34; infantry regiments 15:8; transport units 34:17 and hospitals 82:34. *Id.*

135. A. LAMB, *supra* note 3, at 52.

the Security Council.¹³⁶ While it is obvious for strategic reasons why Pakistan did not inform the Security Council before it committed troops on May 8, 1948, it is unclear why it waited until UNCIP arrived on July 7, 1948 to inform them of its actions.¹³⁷

Furthermore, there is the problem that Pakistan's anticipatory self-defense came after the Security Council had established UNCIP to help resolve the Kashmir dispute and maintain international peace and security, as required by article 51.¹³⁸ However, in considering the extent to which the U.N. Charter today has limited the scope of self-defense, one cannot ignore the effectiveness or ineffectiveness of international machinery as a substitute for individual action.¹³⁹ If the law is ineffective the primordial right of self-defense must reassert itself.¹⁴⁰

At the time Pakistan exercised its right to self-defense, the Security Council had not yet taken measures necessary to maintain international peace and security. As of May 8, the Security Council had only created UNCIP and determined the five members who would make up the commission.¹⁴¹ As of May 8, 1948, the Security Council had yet to take any action that would maintain peace and security in Kashmir or neutralize the very real threat of further implementation of India's "one-nation" policy.¹⁴² India had already accused Pakistan of aggression based on the invasion of Kashmir by tribesmen, Pakistani nationals and soldiers on leave.¹⁴³ India could easily have used this as justification to achieve the final goal of its "one-nation" policy.

Indian writers have asserted that other states should not recognize Pakistan's title over territory it occupies in Kashmir, as such gains were made by force.¹⁴⁴ For reasons previously demonstrated, this argument does not apply to Pakistan's claim to the Gilgit region.¹⁴⁵ While there may be no adequate legal response to this charge as it applies to the rest of Kashmir, it can be argued that "it had always been understood that in assuring the option of accession to either Dominion, the Indian states concerned would not take an arbitrary decision, but would take into account considerations such

136. U.N. CHARTER art. 51.

137. See *supra* text accompanying notes 40-41.

138. See *supra* text accompanying notes 35-56; U.N. CHARTER art. 51.

139. D. O'CONNELL, *supra* note 120, at 315.

140. *Id.*

141. Alam, *supra* note 1, at 66. The composition of UNCIP was completed by May 7, 1948. *Id.*

142. See *supra* text and accompanying notes 126-134.

143. See *supra* text accompanying note 107.

144. H.S. GURURAJ RAO, *supra* note 2, at 37 (citing the Bogota Charter of the Organization of American States, April 30, 1948).

145. See *supra* text and accompanying notes 56-74.

as geographical contiguity.¹⁴⁶ While this may be a weak argument, it is, nonetheless, the very argument used by the Indian representative to the U.N. to justify its economic blockade and military occupation of Junagadh.¹⁴⁷

As already discussed, Kashmir had strong economic and cultural ties with Pakistan. The state possessed an 80% Moslem majority, and most of its exports entered the world market after passing through Pakistan.¹⁴⁸ In addition, the Jhelum, Chenab and Indus rivers flowed from Kashmir into Pakistan, bringing life to the agriculture of the Punjab.¹⁴⁹ Moreover, the best roads in Kashmir lead to Pakistan.¹⁵⁰ The one route from India to Jammu, by way of Pathankot, was more of theoretical than practical utility.¹⁵¹ Pakistan also had a standstill agreement with Kashmir whereby, pending final settlement of Kashmir's future, Pakistan would continue those services which had been carried out for Kashmir under the British by the Punjab government.¹⁵² Finally, in addition to all of these factors, Kashmir has a contiguous border with Pakistan. Continuing with the logical of this argument, Pakistan is no less capable than India of deciding when another state has made an arbitrary decision.¹⁵³ Taking all of the factors into account, "by all rules of reason, [Kashmir] . . . ought to have acceded to . . . [Pakistan]."¹⁵⁴

After presentation of the Kashmir dispute to the Security Council, the majority of its members continued to keep the main focus on a plebiscite and how to bring it about.¹⁵⁵ Columbian representative, Carlos P. Romulo, speaking in the Security Council on January 24, 1957 stated:

I do not think that the Council is called upon to make any finding whether there has been aggression or by whom it was committed. The charge and counter-charge ceased to be relevant the minute both sides agreed to the resolution of UNCIP of 13 August 1948 and 5 January 1949.¹⁵⁶

H.S. Guraraj Rao says that public utterances such as these by members of the Security Council demonstrate their ignorance of the background of the "Kashmir problem," because at no time has India

146. *The India-Pakistan Question*, *supra* note 94, at 400.

147. *Id.*

148. *See supra* text and accompanying notes 8-15.

149. *Id.*

150. *Id.*

151. A. LAMB, *supra* note 3, at 22.

152. *Id.* at 43.

153. *The India-Pakistan Question*, *supra* note 94, at 400.

154. *Id.* "By all rules of reason, Junagadh and the other States [sic] whose accession was in dispute ought to have acceded to the Indian Union." *Id.*

155. H.S. GURURAJ RAO, *supra* note 2, at 54.

156. *Id.* at 54-55.

withdrawn its charge of aggression.¹⁵⁷ However, such utterances may show that the members of the Security Council do understand the background of the Kashmir dispute.

V. United Nations Involvement and the Plebiscite Issue

As previously mentioned, when UNCIP arrived in Pakistan on July 7, 1948, and discovered that war was raging between India and Pakistan, it shifted emphasis of its mediatory influence to efforts to effect a cease-fire. This was to be followed by a truce agreement providing for demilitarization, which would permit holding of a free and impartial plebiscite throughout Kashmir.¹⁵⁸ The results of the Commission's efforts were agreements embodied in the Commission's resolutions of 13 August 1948 and 5 January 1949.¹⁵⁹ These were accepted by the parties to the dispute and implemented by a cessation of hostilities on January 1, 1949, and the establishment of a cease-fire on July 22, 1949.¹⁶⁰

Regarding the resolution of 13 August 1948, the Commission submitted a three-part proposal calling for cease-fire, a truce agreement, and a plebiscite to determine the future status of Kashmir.¹⁶¹ The following principles were suggested as a basis for the truce agreement: (1) The government of Pakistan was to withdraw its troops and use its best endeavor to secure the withdrawal of tribesmen and Pakistani nationals not normally resident in the area.¹⁶² (2) "Pending a final solution," the territory evacuated by Pakistani troops was to be "administered by the local authorities under the surveillance of the Commission."¹⁶³ (3) After the Commission notified the government of India that tribesmen and Pakistani nationals had withdrawn, the government of India would agree to withdraw the bulk of its forces from the state "in stages to be agreed upon with the Commission."¹⁶⁴ (4) The government of India would maintain, "within lines existing at the moment of the cease-fire the minimum strength of its forces which, in agreement with the Commission, were considered necessary to assist the local authorities in the observance of law and order."¹⁶⁵ While Pakistan's initial attempt

157. *Id.* at 55.

158. *See supra* text accompanying notes 40-43.

159. Alam, *supra* note 1, at 66.

160. Karachi Agreement, *supra* note 46, at 280, Part II(B)(1).

161. *Resolution For a Cease-Fire Order and Truce Agreement Adopted By the United Nations Commission on India and Pakistan on 13 August 1948* (contained in report to the Secretary-General on 6 September 1948) at 3, U.N. Doc. S/995 (1948) [hereinafter *Resolution of 13 August 1948*].

162. Alam, *supra* note 1, at 66 (citing *Resolution of 13 August 1948, supra* note 161, at 3).

163. *Id.*

164. *Id.*

165. *Id.* at 66-67.

to conditionally accept the proposals was treated as a refusal, it later accepted the resolution as part of UNCIP's resolution of 5 January 1949.¹⁶⁶

A. *The Plebiscite Issue*

The UNCIP's plebiscite proposals, embodied in the resolution of 5 January 1949, departed from the Security Council's plebiscite proposals of April 21, 1948 by making concessions on points to which India had objected.¹⁶⁷ The government of Kashmir, headed by Sheikh Abdullah as prime minister, was to be left unaltered.¹⁶⁸ The plebiscite administrator, to be named by the U.N. Secretary-General in agreement with the Commission, was to be appointed to office by the government of Kashmir.¹⁶⁹ He was to derive from the state the powers that he should consider necessary to organize and conduct the plebiscite and ensure its freedom and impartiality.¹⁷⁰ Final disposal of Indian and state armed forces was to be determined by the commission and plebiscite administrator in consultation with the government of India after implementing the cease-fire and truce proposals of the 13 August resolution.¹⁷¹ In the territory held by Pakistan, Azad Kashmir, and other pro-Pakistan forces, the 5 January resolution provided that final disposition of the armed forces here would be determined by the Commission and the Plebiscite Administrator in consultation with the local authorities.¹⁷²

Pakistan has found India's treatment of the plebiscite issue in Kashmir frustrating, since India has followed a purely legalistic stand in Kashmir, while it acted quite differently in Junagadh and Hyderabad.¹⁷³ In Junagadh, India insisted that the question of accession should be decided by a plebiscite held under the joint supervision of India and Junagadh.¹⁷⁴ As previously discussed, India used an economic blockade to ensure that Pakistan, to whom Junagadh had already acceded, did not participate in the organizing and holding of the plebiscite.¹⁷⁵ If this principle were to be followed in this case, India would have nothing to do with the plebiscite in Kashmir, leaving the matter to the joint supervision of Pakistan and Kashmir.¹⁷⁶ However, a plebiscite, in any form, has yet to take place.¹⁷⁷

166. *Id.* at 68 (citing UNCIP Res. of 5 Jan. 1949).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *See supra* text and accompanying notes 92-99.

176. Alam, *supra* note 1, at 70.

1. *Problems of Implementation.*—Since 1949, it has become evident that India refuses to agree to demilitarization in any form or sequence so as to permit a free and impartial plebiscite.¹⁷⁸ This refusal first presented itself as a matter of interpretation of the 13 August and 5 January resolutions.¹⁷⁹

Two problems arose over interpretation of the 13 August and 5 January resolutions. The first problem was political. India understood that the "local authorities" who were to administer the territory in Azad Kashmir meant the state government headed by Sheikh Abdullah; while Pakistan believed the term "local authorities" meant the Azad Kashmir government.¹⁸⁰ The second disagreement arose over the method by which the withdrawal of Pakistani and Indian troops would be synchronized.¹⁸¹

In an effort to break this deadlock, on August 26, 1949, the Commission proposed arbitration regarding the issues raised relating to Part II of the 13 August resolution.¹⁸² The arbitrator was to decide the questions according to equity and his decision was to be binding on the parties.¹⁸³ Pakistan accepted the proposal, but India rejected it.¹⁸⁴ On August 13, India also rejected a similar proposal for arbitration by President Truman and British Prime Minister Attlee.¹⁸⁵

On December 17, 1949, the Security Council asked its President, General A.G.L. McNaughton of Canada, to meet with India and Pakistan to settle the outstanding issues.¹⁸⁶ McNaughton met informally with the parties to search for a mutually satisfactory basis for dealing with the questions at issue.¹⁸⁷ In general, Pakistan accepted McNaughton's proposals, but India did not.¹⁸⁸ A Security Council resolution based on these proposals, adopted on March 14, 1950, was similarly rejected by India. This resolution also replaced UNCIP with a single U.N. representative, but kept UNMOGIP in

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 71.

181. *Id.*

182. *Id.* (citing Part II of *Resolution of 13 August 1948*, *supra* note 161, at 3, regarding a truce agreement).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 72.

187. *Id.* McNaughton proposed: (a) the withdrawal of Pakistani regular forces; and the withdrawal of Indian regular forces not needed to keep law and order on the Indian side of the cease-fire line; (b) the reduction, by disbanding and disarming of local forces, including on the one side, the armed forces and militia of the state of Kashmir and on the other, the Azad forces; (c) the inclusion of the northern area in this program of demilitarization and its continued administration by the existing local authorities, subject to U.N. supervision. *Id.* at 72-73.

188. *Id.* at 73.

place.¹⁸⁹

U.N. Representative, Sir Owen Dixon of Australia, in his report to the Security Council in September 1950, proposed a limited or partial plebiscite, but this was rejected by both parties.¹⁹⁰ Pakistan would accept nothing less than a plebiscite that would settle the fate of the entire state, while India would not accept even a partial plebiscite in the Vale of Kashmir.¹⁹¹

In reports to the Security Council in 1952, U.N. Representative Dr. Frank P. Graham noted that the principal points of difference between the parties continued to be the quality of forces each should maintain after demilitarization and the time when the plebiscite administrator should assume his duties.¹⁹²

B. Resolution of 13 August 1948 Disputed

To this day, although in changing forms and for varying reasons, India has persisted in its original refusal of demilitarization in any form or sequence so as to permit a free and impartial plebiscite.¹⁹³ In 1957, at the request of the Security Council, its President, Gunnar Jarring of Sweden, went to the subcontinent in an attempt to make progress towards settlement of the dispute.¹⁹⁴ Jarring noted that both governments adhered to the resolutions of 13 August and 5 January; but the government of India confronted Jarring, contending that Part I of the 13 August resolution, Sections B and E had not been implemented by Pakistan.¹⁹⁵ India argued that Parts II and III were contingent upon implementation of Part I.¹⁹⁶ Therefore, there was no question of implementing Parts II and III or the 5 January resolution which dealt with the plebiscite.¹⁹⁷ Pakistan contended that Part I had been met, and that it was time to proceed with demilitarization under Part II, to prepare for implementation of

189. *Id.* (citing S.C. Res. of 14 March 1950).

190. *Id.*

191. *Id.* at 74.

192. *Id.* Dixon was prepared to accept the view that Pakistan violated international law when its troops crossed into Kashmir. He suggested that Pakistan withdraw its forces first, then Indian troops should be withdrawn and both the Kashmir state forces and Azad Kashmir forces should be disbanded. Dixon also proposed appointment of political agents representing the U.N. in the northern areas and attaching U.N. officers with supervisory powers to magistrates on either side of the cease-fire line for the rest of Kashmir. As an alternative, Dixon suggested the establishment of a unified government for the entire state during the period of the plebiscite. These suggestions were rejected by India. *Id.*

193. *Id.* at 75. India was willing to negotiate on the difference over the number and character of forces to be left on each side of the cease-fire line at the end of demilitarization. However, it rejected the proposal that the plebiscite administrator-designate be associated with the U.N. Representative in further talks with the parties. *Id.*

194. *Id.* at 70.

195. *Id.* at 79.

196. *Id.*

197. See H.S. GURURAJ RAO, *supra* note 2, at 94.

the 5 January resolution.¹⁹⁸

1. *Resolution of 13 August Part I, Section B.*—This section of the 13 August resolution deals with the augmentation of military potential.¹⁹⁹ India asserts that after the resolutions of 13 August and 5 January were adopted, Pakistan violated Part I, Section B by training and maintaining the Azad Kashmir forces.²⁰⁰ In support of this argument, reference is made to an UNCIP report to the Security Council which notes that the 13 August resolution did not record the presence of the Azad Kashmir.²⁰¹ However, this is a correction of an oversight, not confirmation of a large-scale program of training and equipping the Azad Kashmir forces. Moreover, it makes no reference to equipping the Azad Kashmir forces after the resolutions.

In addition, in a December 9, 1953 letter to the Pakistani Prime Minister, the Indian Prime Minister held that Pakistan's entry into a military aid agreement with the United States, as part of its membership in the Southeast Asia Treaty Organization (SEATO), would create a whole new situation.²⁰² This would seriously change relations between the two countries and would have a direct bearing on the demilitarization of the Kashmir state.²⁰³ It is argued that Part I, Section B totally prohibited India and Pakistan from taking any measures that would have had the effect of increasing the striking capacity of the forces on either side of the cease-fire line.²⁰⁴ The

198. *Id.*

199. Alam, *supra* note 1, at 79.

200. *Resolution of 13 August 1948*, *supra* note 161, at 3, Part I, § B: "The High Commands of India and Pakistan agree to refrain from taking any measures that augment the military potential of the forces under their control in the State [sic] of Jammu and Kashmir (for purposes of these proposals "forces under their control shall be considered to indicate all forces, organized and unorganized, fighting or participating in hostilities on their respective sides)." *Id.*

201. H.S. GURURAJ RAO, *supra* note 2, at 92. "It is true that Pakistan, after the adoption of the resolutions of 13 August 1948 and 5 January 1949, has introduced into the territory of Kashmir occupied by its huge quantities of military equipment and has been mainly instrumental in training, equipping, and modernizing the Azad Kashmir forces. The UNCIP has laid down in categorical terms that Pakistan was responsible for increasing the military potential of the forces on the Pakistan side of the cease-fire." *Id.*

202. *Id.* at 349 n.211.

The Commission says in paragraph 203: "The resolution of 13 August 1948 . . . did not, however, record a second element which has developed subsequently into a serious problem in the implementation of that resolution: The Azad (free) Kashmir movement, whose fighting forces today number some 32 well-equipped battalions. This movement, Muslim [sic] in character, has become the centre [sic] of strong and violent resistance to the accession of the state of India. It controls a considerable part of the western area of the State [sic], claims to be fully organized as a government and its political activities appear to be directed towards the accession of the State [sic] of Pakistan"

Id.

203. See *id.* at 75 (citing Letter from Indian Prime Minister Jawaharlal Nehru to Pakistani Prime Minister Mohammed Ali (December 9, 1953)).

204. *Id.*

UNCIP and the Security Council expected to settle the Kashmir dispute soon after both parties agreed to be bound by the terms of the 13 August and 5 January resolutions and they were surprised at the obstacles they found in their way.²⁰⁵ In view of this fact, it cannot be expected that the Security Council intended compliance with the resolution to require the armed forces of both countries to remain at a 1948 level of advancement until the dispute was settled. Nor does it appear that India believed this argument either. From independence in 1947 to 1965 both countries allotted between 30 and 60% of their yearly budgets for defense.²⁰⁶

2. *Resolution 13 August Part I, Section E*.—"The Government [sic] of India and the Government [sic] of Pakistan agree to appeal to their respective peoples to assist in creating and maintaining an atmosphere favorable to the promotion of further negotiations."²⁰⁷ India accuses Pakistan's political leaders and press of a "campaign of war and hatred" in violation of Part I, Section E of the 13 August resolution.²⁰⁸ However, both parties are guilty of failing to create a favorable atmosphere for further negotiations.

As previously discussed, the "one-nation" theory could be seen at work in India's policy towards Junagadh, Hyderabad and Kashmir in 1947 and 1948.²⁰⁹ The Hindu majority of the Indian national movement had refused to accept the "two-nation" theory of the Mohammed Ali Jinnah and the Muslim League.²¹⁰ Some Hindu extremists saw partition in terms of religious war and felt it was their duty to defend the Hindu Maharaja of Kashmir against the forces of Islam.²¹¹ Josef Korbel states that the real cause of "all the bitterness and bloodshed, all the envenomed speech, the recalcitrance and the suspicion that have characterized the Kashmir dispute is the uncompromisable struggle of two ways of life, two concepts of political organization, two scales of values, two spiritual attitudes that find themselves locked in deadly conflict"²¹²

Emotions this strongly felt by both sides are not eliminated overnight by agreement to a U.N. resolution, nor were they. In 1962, after a four year lapse in the Security Council's consideration of the Kashmir dispute, it was again brought to their attention by Pakistani

205. *Id.* at 92.

206. See generally Alam, *supra* note 1, at 68-80 (outlining the Security Council's repeated attempts to resolve interpretation disagreements from 1949 to 1965).

207. A. LAMB, *supra* note 3, at 87.

208. *Resolution of 13 August 1948*, *supra* note 161, at 3, Part I, § E.

209. H.S. GURURAJ RAO, *supra* note 2, at 92-3.

210. See *supra* text and accompanying notes 126-34.

211. *Id.*

212. A. LAMB, *supra* note 3, at 40.

delegate, Zafrullah Kahn, in protest against certain bellicose speeches by Indian statesmen calling for the "liberation" of Azad Kashmir.²¹³ Such emotions have persisted throughout the course of the Kashmir dispute and still exist today.²¹⁴

The U.N. Charter calls on its members "to fulfill in good faith obligations assumed by them in accordance with the . . . Charter."²¹⁵ India was under a duty to use good faith in meeting its obligations under the 13 August resolutions. In addition, the resolution should be interpreted in good faith in light of its object and purpose.²¹⁶ As such, either state's expectation regarding the requirements of Part I, Section E should have been tempered by reason and good faith.

As previously mentioned, India argues that Part I, Section B of the 13 August resolution prohibited any measures that would increase the striking capacity of the forces on either side of the cease-fire line.²¹⁷ But from 1947 to 1965, India allotted 30 to 60% of its yearly budget on defense.²¹⁸ India accuses Pakistan of waging a "campaign of war and hatred in violation of Part I, Section E of the 13 August resolution, while such emotions have been shown to be present on both sides."²¹⁹ India's unreasonable claims and expectations can be seen as stalling in bad faith to escape its plebiscite obligations under the 13 August and 5 January resolutions.

C. *Binding Force of the 13 August and 5 January Resolutions*

In addition to the argument that Pakistan has not met Part I of the 13 August resolution, and disagreement over demilitarization under Part II, India also argues that it is not bound by the resolutions of 13 August and 5 January.²²⁰ This argument is based on the fact that since the Kashmir dispute was brought to the Security Council under articles 34 and 35 of the U.N. Charter, the two are merely recommendations of the Security Council.²²¹

Since the dispute was brought under articles 34 and 35, the Security Council only has the power to "make recommendations to the parties with a view to a pacific settlement of the dispute" under arti-

213. J. KORBEL, *supra* note 126, at 43.

214. A. LAMB, *supra* note 3, at 64.

215. See Desmond, *supra* note 47, at 29.

216. U.N. CHARTER art. 2 para. 2: "All Members [sic], in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter." *Id.*

217. Vienna Convention on the Law of Treaties, *supra* note 81, art. 31, para. 1: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." *Id.*

218. See *supra* text accompanying note 208.

219. See *supra* text accompanying note 210.

220. See *supra* text accompanying notes 212-218.

221. H.S. GURURAJ RAO, *supra* note 2, at 105.

cles 37 and 38.²²² A "recommendation" is not the same as a Security Council "decision" under article 25, which is binding on U.N. members.²²³ "Recommendations made by the Council under articles 36, 37, 38, and 39, in performance of its function of peaceful settlement, are, notwithstanding the provision of article 25, to be treated as recommendations only, and not as legally obligating members to carry out their terms."²²⁴

While a recommendation by itself may not be binding, this is not the case in the Kashmir dispute. Here, the parties have consented to be bound by the resolutions of 13 August and 5 January.²²⁵ A letter dated December 23, 1948, from India's Secretary-General of the Ministry of External Affairs to the Representative of UNCIP, stated that the Indian Prime Minister's acceptance of the 5 January resolution was conditioned on Pakistan's acceptance of the resolution.²²⁶ By this letter, India consented to be bound by the resolution of 5 January and, through this, the resolution of 13 August as well.²²⁷ As U.N. members consenting to be bound by the resolutions to hold a plebiscite in Kashmir, India was also bound by its provisional acceptance of the Maharaja's accession and the words of Jawaharlal Nehru.²²⁸ Therefore, India was bound by word and deed to leave the future of Kashmir to the will of its people.

D. *Rebus Sic Stantibus*

In 1953, India first claimed a vital change of circumstances would occur in the Kashmir dispute as a result of the U.S.-Pakistan

222. See *supra* text and accompanying note 32.

223. U.N. CHARTER art. 37, para. 2: "If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate." *Id.*

Art. 38: "Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute." *Id.*

224. U.N. CHARTER art. 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.*

225. 13 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 360 (1968).

226. See *supra* text accompanying note 160.

227. Aide Memoire No. 1, Letter Dated 23 December 1948 From the Secretary General of the Ministry of External Affairs and Commonwealth Relations of the Government of India to Mr. Alfredo Lozano, Representative of UNCIP at 23, U.N. Doc. S/1196 (1949):

the Prime Minister emphasized that, if the Government of India were to accept the plebiscite proposals, no action could be taken in regard to them until parts I and II of the Commission's resolution of 13 August had been fully implemented; (2) that in the event of Pakistan not accepting these proposals or, having accepted them, not implementing Parts I and II of the Resolution of 13 August, the Government of India's acceptance of them should not be regarded as in any way binding upon them"

Id.

228. See *supra* text accompanying notes 167-72.

military aid program due to Pakistan's membership in SEATO.²²⁹ The doctrine of *rebus sic stantibus* applies when an unforeseen change of circumstances occurs in regard to essential circumstances existing at the time an agreement was concluded.²³⁰ The existence of such circumstances must have been necessary to the parties for their consent to be bound by the treaty.²³¹

It is argued that Part I, Section B of the resolution of 13 August, totally prohibited India and Pakistan from taking any measures that would have the effect of increasing the striking capacity of the forces on either side of the cease-fire line.²³² In view of this, it is argued that the U.S.-Pakistan military aid program constituted a fundamental change in circumstances.²³³ However, as previously mentioned, during the period from 1947 to 1965 both countries allotted 30 to 60% of their budgets to defense. In fact, during this period, though the budget percentage spent on defense tended to be higher in Pakistan, India, with its greater national income, spent much more money on defense than Pakistan.²³⁴ In addition, while not actually receiving arms, India did receive large amounts of economic aid from the United States, allowing it to devote more of its own resources to defense.²³⁵

Thus, at the time the resolution of 5 January was accepted and long afterwards, it was the practice of both countries to devote a large portion of their budgets to defense. In view of this fact, it cannot be considered that Part I, Section B of the 13 August resolution was intended by either party to apply to any augmentation of their armed forces. Nor can it be considered that the continued existence of such circumstances had been necessary to the parties for their consent to be bound by the resolution. Rather, this would seem to indicate that the section was meant to apply only to the forces in Kashmir. Therefore, India's claim of *rebus sic stantibus* in 1953 was without merit.

As previously mentioned, India had a duty to exercise good faith in fulfilling its obligations under the resolutions of 13 August

229. See *supra* text and accompanying note 216.

230. See *supra* text and accompanying notes 75-86.

231. See *supra* text accompanying note 203.

232. Vienna Convention on the Law of Treaties, *supra* note 81, art. 62, para. 1: A fundamental of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty.

Id.

233. *Id.*

234. See *supra* text accompanying notes 204.

235. See *supra* text accompanying notes 203.

and 5 January.²³⁶ By its continuous bad faith assertions of Pakistani violations of the resolution of 13 August, India breached this duty.²³⁷ In this way, India avoided the plebiscite obligations of the resolutions and invoked the doctrine of *rebus sic stantibus*. However, a party whose breach causes a fundamental change of circumstances may not invoke the doctrine of *rebus sic stantibus*.²³⁸ India's breach of its duty of good faith allowed forty years to pass without holding a plebiscite in Kashmir.²³⁹

Regardless of bad faith, forty years after agreeing to the terms of the 5 January resolution, India's claim of *rebus sic stantibus*, reasserted repeatedly by Indian writers, is now valid.²⁴⁰ The Kashmir dispute was drawn into the shadow of the Cold War in 1955, when, in response to Pakistan's membership in SEATO and the Central Treaty Organization (CENTO), India cultivated relations with the Soviet Union.²⁴¹ Thereafter, India began to receive moral support as well as military aid from U.S.S.R.²⁴²

In 1965, the head of UNMOGIP reported that infiltrators had crossed into Kashmir from the Pakistan side, violating the cease-fire line.²⁴³ This trickle of infiltrators soon escalated to open fighting between India and Pakistan.²⁴⁴ By September 1, Pakistani regular units were supporting Azad troops in a major attack to cut Indian lines of communications along the road from Pathankot through Jammu to Srinagar by way of the Banihal Pass.²⁴⁵ On September 6,

236. A. LAMB, *supra* note 3, at 87.

237. *Id.* at 86-87.

It was U.S. aid which enabled India during this period to concentrate on industrialization at the expense of agriculture: her leaders knew that, in the last resort, they could rely on American help to feed the people. The result of this policy [was] . . . the development of a crisis in Indian agriculture of the gravest kind; but, at the same time, Indian industry [was] able to produce an ever-increasing proportion of sophisticated weapons

Id.

238. *See supra* text and accompanying note 216.

239. *See supra* text accompanying notes 201-16.

240. Vienna Convention on the Law of Treaties, *supra* note 81, art. 62, para. 2:

A fundamental change in circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Id.

241. Alam, *supra* note 1, at 70. To this day, a plebiscite on the future of Kashmir still has not occurred. *Id.*

242. H.O. AGARWAL, *supra* note 92, at 44; H.S. GURURAJ RAO, *supra* note 2, at 104.

243. *See generally* A. LAMB, *supra* note 3, at 88 (outlining the relations the U.S. and U.S.S.R. had with Pakistan and India, respectively, and how this, in turn, affected the Kashmir dispute).

244. *Id.* "The question of Kashmir as one of the constituent States of the Republic of India has already been decided by the people of Kashmir Facts show that the population of Kashmir do not wish that Kashmir become a toy in the hands of imperialist forces." (quoting Speech by Nikita Khrushchev in New Delhi, (November 1955)). *Id.*

245. Alam, *supra* note 1, at 80.

India countered this move with an attack across India-Pakistan international border, directly into Pakistan from Indian territory.²⁴⁶

The conflict continued, but the Security Council failed to take any action under Chapter VII of the Charter: Pursuant to article 40, the Security Council could order the two governments to desist from further military action, calling on them to issue cease-fire orders to their forces.²⁴⁷ Failure to comply with this order would demonstrate an existence of a breach of the peace within the meaning of article 39.²⁴⁸ Then, under articles 41 and 42, a variety of actions from economic boycotts to military action could be taken to force compliance with the Security Council decision.²⁴⁹

Instead, the Security Council continued to make recommendations under Chapter VI with the same results: After enacting two unheeded resolutions, the Security Council enacted resolution 211 of 20 August 1965.²⁵⁰ This resolution "demand[ed] that a cease-fire should take effect" at a specified date.²⁵¹ Both governments were called upon to issue orders for a cease-fire at that moment and a subsequent withdrawal of all armed personnel back to the positions held by them before 5 August 1965.²⁵² The parties accepted resolution 211, but the cease-fire failed to materialize.²⁵³

After two more unheeded resolutions, the Tashkent Declaration

246. See A. LAMB, *supra* note 3, at 120-22.

247. *Id.* at 122.

248. *Id.*

249. Alam, *supra* note 1, at 81; U.N. CHARTER art. 40:

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendation or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable The Security Council shall duly take account of failure to comply with such provisional measures.

Id.

250. U.N. CHARTER art. 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.*

251. U.N. CHARTER art. 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members [sic] of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Id.

Art. 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security"

Id.

252. Alam, *supra* note 1, at 82 (citing S.C. Res. 211, 21 U.N. SCOR, Supp. (Res. & Dec.) at 13, U.N. Doc. S/INF/21/REV.2 (1965) [hereinafter Resolution 211]).

253. See Resolution 211, *supra* note 252, at 14.

(the Declaration) secured a cease-fire and ended the stalemate.²⁵⁴ The Declaration was the result of the Soviet Union's offer to help resolve the differences between India and Pakistan.²⁵⁵ It established the withdrawal of the armies behind the established international borders and the 1949 Kashmir cease-fire line and bound the parties to settle their disputes by peaceful means.²⁵⁶ The Declaration had little to say directly about the Kashmir dispute other than to note its existence.²⁵⁷

The cease-fire line was violated again in 1971 during the war over Bangladesh when both sides made gains across the 1949 line.²⁵⁸ In 1984, the Indian army captured nearly 1,000 square miles of territory claimed by Pakistan in the northern regions in the area of the Saltoro Range where vague terms are used to delineate the cease-fire line under the Karachi Agreement.²⁵⁹ Today, sporadic fighting continues in this region for possession of the Siachen Glacier in the Saltoro Range.²⁶⁰ Neither side is willing to escalate the conflict any further, nor willing to give up the territory it has gained.²⁶¹

In addition to these developments, there is also the consideration that over the course of forty years, both countries have integrated the regions of Kashmir under their control into their societies and economies.²⁶² In view of these facts, it is not difficult to see that a fundamental change of circumstances has occurred. The events that occurred since the acceptance of the resolutions of 13 August and 5 January: the Cold War, multiple large-scale violations of the cease-fire agreement, integration and the passing of forty years, were not foreseen by the parties at the time of agreement.²⁶³ As a result of these changed circumstances, holding a plebiscite today is an obligation radically different from when it was contemplated in 1949.²⁶⁴

254. *Id.*

255. Alam, *supra* note 1, at 82.

256. *Id.* (citing the Tashkent Declaration, January 10, 1966, India-Pakistan, 560 U.N.T.S. 40 [hereinafter Tashkent Declaration]).

257. Alam, *supra* note 1, at 82.

258. Tashkent Declaration, *supra* note 256, at 40, paras. I, II.

259. *Id.* at 40, para. I.

260. J. PRESCOTT, *supra* note 47, at 61.

261. Desmond, *supra* note 47, at 26 (citing the Karachi Agreement); "From Dalunang eastwards the cease-fire line will follow the Point 15495 . . . thence north to the glaciers [italics added]" Karachi Agreement, *supra* note 46, at 280, Part II(B)(a)(iii)(d).

262. Desmond, *supra* note 47, at 29. "On those occasions when the antagonists do fight at close range, the results can be fearsome. In a month-long clash ending last May, soldiers battled intensely on a mountain and ridges near the Chumic Glacier." *Id.*

263. See *id.* at 27. "The conflict escalated slowly as each side deployed more men, established more outpost, introduced more artillery and rockets. In September 1987, the action peaked, but neither side has been willing to take the next steps, which might involve introducing air power or expanding the conflict to the south." *Id.*

264. H.O. AGARWAL, *supra* note 92, at 146; H.S. GURURAJ RAO, *supra* note 2, at 107-08.

VI. Current Events

Recently, tensions between India and Pakistan have increased once again after kidnappings and mass demonstrations began in Kashmir in December of 1989.²⁶⁵ Since the outbreak of violence and Kashmir Governor Jagmohan's responding crackdown in January, at least 350 civilians and 62 soldiers have been killed.²⁶⁶ India charges that Pakistan is inciting a secessionist struggle in Indian-occupied Kashmir where some thirty rebel groups are fighting Indian rule.²⁶⁷ While U.S. officials confirm that Pakistanis are providing aid and sanctuary to Kashmiri insurgents, Pakistan states that its support is limited to political, diplomatic and moral support.²⁶⁸

The rebel factions in Kashmir can be divided into two classes: Islamic fundamentalists advocating union with Pakistan and, a new element, those supporting an independent Kashmir.²⁶⁹ While both elements have received support from Pakistan, former Prime Minister Bhutto may have lost some support from the independent-Kashmir element by ruling out an independent Kashmir as an option.²⁷⁰

To add to an already-tense situation, both countries are experiencing outbreaks of violence. In India's Punjab region, violence stemming from a separatist movement has resulted in over 300 deaths; while in Pakistan, ethnic violence in the Sind province has left over 300 dead.²⁷¹ Pakistan has accused India of stirring up un-

265. See *supra* text and accompanying note 217.

266. Vienna Convention on the Law of Treaties, *supra* note 81, art. 62., para. 1:

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating the treaty unless:

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

Id.

267. See Kamen, *Removal of Indian Troops May Ease Tension with Pakistan*, *Diplomats Say*, Wash. Post, June 1, 1990, at A29, col. 1; MacFarquhar, *supra* note 91, at 44.

268. MacFarquhar, *supra* note 91, at 44.

Inspired by TV footage of Eastern Europe, which was later taken off Kashmiri screens because it was too provocative, the insurgents were on a roll. But it was the arrival in January of Governor Jagmohan, whose first police sweep left some 100 dead, that started pushing a disgruntled populace into the arms of secessionists.

Id.; Coll, *Kashmiri Hatred of Indian Soldiers Fuels Conflict*, Wash. Post, May 30, 1990, at A15, col. 1 [hereinafter Coll]. "The government confirms that 62 soldiers have died in ambushes by separatists militants, but military sources say the number of deaths is higher." *Id.*

269. MacFarquhar, *supra* note 91, at 42.

270. *Id.* at 42; *Pakistan's position on Kashmir*, Christian Sci. Mon., June 7, 1990, Editorial, at 20. In a letter in response to an earlier editorial, Irfan Husain, of the Pakistani Embassy in Washington, stated: "Pakistan is openly giving Kashmir freedom fighters its political, diplomatic, and moral support, but this is the extent of our 'active backing.'" *Id.*

271. MacFarquhar, *supra* note 91, at 44; Fieman, *Pakistan ousts Bhutto; corruption is alleged*, Boston Globe, Aug. 7, 1990, at 1, col. 1. Prime Minister Bhutto was dismissed by President Ghulam Ishaq Kahn on August 6, 1990 and replaced by acting Prime Minister Ghulam Mustafa Jatoi until elections could be held in October. *Id.*

rest in Pakistan's Sind province to divert Pakistan's attention from Kashmir.²⁷²

As previously mentioned, many fear that current tensions over Kashmir may plunge India and Pakistan into an unprecedented full-scale war where both sides possess nuclear forces.²⁷³ Although troops have moved closer to the borders on both sides and shortened mobilization times, there are many indications of a reluctance on both sides to take that plunge.²⁷⁴ Recently, India pulled back artillery left in a forward position after a winter exercise and withdrew troops from the border between Pakistan and the Indian state of Rajasthan.²⁷⁵ Pakistan has suggested that the two countries disengage from warlike postures, tone down their verbal attacks on one another and undertake mutual reductions of military forces along the border.²⁷⁶

Moreover, some assert that the war rhetoric is "entirely simulated" and Kashmir has been used by the leaders on both sides to stabilize their positions.²⁷⁷ Another consideration is the cost of such a conflict. An Indian study estimated that a quick, conventional conflict would cost \$2.5 billion dollars, while a recent Pakistani study estimated a cost of \$350 million a day.²⁷⁸ Finally, the United States, the Soviet Union, China, Japan and some European countries have called on both countries to exercise restraint and open peace talks.²⁷⁹ Although India rejected a suggestion by Pakistan for discussion of Kashmir, pressure from the world community may yet succeed in bringing about such talks, or at least emphasize the lack of support

272. *Id.*

273. See *id.* at 42; *Ethnic Strife Goes On in Pakistani Province*, N.Y. Times, May 29, 1990, § A, at 10, col. 1; *Attack on Packed Karachi Bus Lifts Ethnic Death Toll to 300*, Wash. Post, June 1, 1990, at A29, col. 5. "The violence [in the Sind province] stems from deep hatred between native Sindis and the Mohajirs, descendants of Moslems who immigrated to Pakistan from Hindu India during the 1947 partition of the subcontinent. Sindis accuse the better-educated Mohajirs of taking the best jobs and most valuable land." *Id.*

274. *Pakistan's Senior Minister says India Behind Events in Sindh* [sic], BBC Summary of World Broadcasts/The Monitoring Report, May 31, 1990, Part 3, at FE/0778/i. "Begum Nusrat Bhutto said at a news conference in Rawalpindi on 29th May that Indian agents were behind the recent unrest in Hyderabad and Karachi in order to avert Pakistan's attention from Kashmir, Radio Pakistan reported." *Id.*

275. See *supra* text and accompanying note 49.

276. See MacFarquhar, *supra* note 91, at 43.

277. *Id.*; Crossette, *India Rejects Talks With Pakistan Over Kashmir*, N.Y. Times, June 9, 1990, § 1, at 3, col. 1. [hereinafter Crossette].

278. *40 Reported Killed in Indian-Pakistani Clash*, Chicago Tribune, May 22, 1990, § 1, at 4, col. 2.

279. MacFarquhar, *supra* note 91, at 44.

Kashmir has become a lifesaving political crusade for the embattled Bhutto, caught between an unforgiving opposition and a still-dominant Army and confronting a civil war in her own home province of Sind . . . Singh, who also heads an insecure coalition, has a similar need to pander to militant Hindus who want to punish both Moslem Kashmiris and Pakistan.

Id.

for either side should war break out.²⁸⁰

VII. Alternatives

On January 1, 1949, the Karachi Agreement's cease-fire order made a *de facto* partition of Kashmir. Even today this cease-fire order, aside from minor adjustments in 1965 and 1971, is binding on both India and Kashmir. In view of the slim chance of a plebiscite or an evacuation of the territory of Kashmir by Pakistan, one alternative that remains, in the interest of a final settlement of the dispute, is to make the *de facto* partition *de jure*. In this case, establishing an international boundary along the cease-fire line would be most easily accomplished by submitting the disputed boundary for settlement to a chamber of the International Court of Justice for a decision *ex aequo et bono*.²⁸¹

In the interest of possessing an undisputed, undisrupted claim to part of the territory, India and Pakistan would have to drop their claims to the entire state. Creating an international boundary along the cease-fire line would require close cooperation between the two countries. The parties must also be willing to compromise on minor adjustments to the boundary that will undoubtedly arise. At present, territory in the northern reaches is in dispute as a result of vagueness in the 1949 cease-fire agreement.²⁸² Meetings between former Prime Ministers Benazir Bhutto and Rajiv Gandhi to settle the ongoing conflict in this region failed to produce a solution.²⁸³ Considering the history of the Kashmir dispute, a solution for even this small section of the cease-fire line is more difficult than it sounds.

In view of this fact, the best chance for final settlement of the dispute may be to submit the boundary for settlement to a chamber of the International Court of Justice (Court).²⁸⁴ This was done successfully by Burkina Faso and Mali, two decolonized African territories, where dispute had arisen over 100 miles of common frontier.²⁸⁵ France's delimitation of the border in this case did not take into account native allegiances which compounded the difficulty in determining a border that satisfied the tribunal inhabitants of the

280. *Id.* at 42.

281. Chicago Tribune, *supra* note 278, § 1, at 4, col. 2.

282. Crossette, *supra* note 277, § 1, at 3, col. 1. "An Indian spokesman said . . . that the Pakistani response was 'unfortunately hedged with certain reservations' that were unacceptable here." *Id.* MacFarquhar, *supra* note 91, at 44. "[I]f India and Pakistan are foolish enough to fight, they will be on their own. That is the message that has come lately not just from Washington and Moscow but from the Chinese and Arabs, as well. As one Indian observer pointed out, 'Not even Qadhafi has encouraged either side.'" *Id.*

283. BLACK'S LAW DICTIONARY 500 (5th ed. 1979). *Ex aequo et bono* is a phrase derived from the civil law, meaning, in justice and fairness; according to what is just and good; according to equity and conscience. *Id.*

284. Desmond, *supra* note 47, at 26-27.

285. *Id.*

region.²⁸⁶

By agreement between the parties as to the contents of the dispute they are bringing before the Court, they may limit the Court's jurisdiction and the scope of the judgment.²⁸⁷ In this way, India and Pakistan can confine the Court to settlement of the dispute in the northern regions or for the whole cease-fire line, preventing a judgment on the status of all of Kashmir. The chamber's decision, like the Court's, is binding and would finally create an international border, eliminating a continuing thorn in relations between India and Pakistan.²⁸⁸

By resorting to the International Court of Justice, India and Pakistan can eliminate much of the disagreement and stalemate that would undoubtedly occur in settling the border through diplomatic channels. By placing the final decision in the Court's hands, the Prime Ministers could escape some of the blame and political risk that is bound to come with any decision on the future of Kashmir that does not provide complete possession.

In submitting the dispute to a special chamber of the International Court of Justice, it should be agreed between the parties that, in addition to applying international conventions, custom and general principles of law, the Court should be allowed to decide the case *ex aequo et bono*.²⁸⁹ This is necessary because it is crucial for the Court to consider the circumstances surrounding the Kashmir dispute. A purely legal decision in this case would neglect the roots of the conflict and the role that other factors and events played in the dispute. These elements must be considered in any final settlement of the border that seeks a fair and equitable solution that both parties can live with. In view of the violent history of the Kashmir dispute, a settlement that neglects these elements will not be a final one.

Once India and Pakistan progressed to the stage where they were willing to submit the border issue to the International Court of Justice, an agreement to allow the Court to decide *ex aequo et bono*

286. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 26, *reprinted in* EVERYONE'S UNITED NATIONS, *supra* note 31, at 402-09 [hereinafter STATUTE OF THE INTERNATIONAL COURT OF JUSTICE]:

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges shall be determined by the Court with the approval of the parties.
3. Cases shall be heard and determined by the chambers provided for in this Article if the parties so request.

Id.

287. Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 3 (Judgment of Dec. 22).

288. Case Comment, *International Court of Justice—Case Concerning the Frontier Dispute, (Burkina Faso v. Mali)* 27 HARV. INT'L L.J. 718 (1986).

289. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 286, at 406, art. 35, para. 1: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." *Id.*

would not be too far-fetched. To reach this point, India and Pakistan would have given up their claims to all of Kashmir. This would indicate a willingness to achieve a final settlement acceptable to both parties. In this context, a fair and equitable decision would be viewed as the best means to achieve a solution that was actually final.

This proposed alternative ignores an important element in the Kashmir dispute: the people of Kashmir. A growing number of Kashmiri separatists are calling for independence.²⁹⁰ Although Pakistan still demands that the Kashmiris be allowed to determine the future of Kashmir by a plebiscite, former Prime Minister Bhutto already ruled out independence as an option.²⁹¹ Should the independence movement take hold and become the will of the people, Pakistan will be forced to reexamine its policy on Kashmir and choose between the lesser of two possible evils: an independent Kashmir or the status quo. But at the present, it appears that neither India nor Pakistan considers an independent Kashmir to be a possibility. Therefore, although a *de jure* settlement of the border may not settle the issue for the Kashmiris or even many Indians and Pakistanis who feel strongly about the dispute, it *would* resolve the dispute as it exists between India and Pakistan as states, reducing the chance of a large-scale conflict between the two in the future.

VIII. Conclusion

While relations between India and Pakistan are better now than they have been in the past, the likelihood of a large-scale settlement of the Kashmir dispute is slim. Earlier attempts by Prime Ministers Gandhi and Bhutto to settle the dispute in the Saltoro range alone met with failure. An attempt to settle the entire dispute by making the cease-fire line an international boundary would be a very risky undertaking. Each prime minister would run the risk of being the one who "sold out Kashmir."

In addition to its strategic and economic value, the possession of Kashmir has come to be associated with the concepts of national prestige and justice. After forty years, Kashmir remains an obstacle

290. *Id.* at 404, art. 27: "A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court." *Id.*

291. *Id.* at 406, art. 38:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions; (b) international custom; (c) general principles of law recognized by civilized nations; (d) judicial decisions and teachings of the most highly qualified publicists.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Id.

in relations between India and Pakistan. At this point in time, the chance of a final settlement of the Kashmir dispute is very doubtful.²⁹²

Both India and Pakistan will continue to argue their positions loudly and forcefully. Both sides have convincing arguments as to why Kashmir is theirs by right. But as this Comment illustrates, it is impossible to label one party innocent and the other the offender. Viewing all of the events from partition to the present, neither side is more "right" than the other. The only just solution in this case is the one that, in light of the developing independence movement in Kashmir, might dismay both India and Pakistan: a U.N. supervised plebiscite that includes an independent Kashmir as a possible outcome.²⁹³

James D. Howley

292. Chicago Tribune, *supra* note 278, § 1, at 4, col. 2. "Although a majority of young secessionists at one time favored attaching Kashmir to Pakistan, many now call for independent nation status." *Id.*

293. Coll, *supra* note 268, May 30, 1990, at A15, col. 1; *see supra* text accompanying note 273.